accruing while the property is used in that state without providing tax credit for the sales tax previously paid on the entire stream of lease payments for the entire lease term to the first state where the lease was originated. Various state tax commissioners, including the Florida Department of Revenue ("FLDOR") in this case, are as a matter of policy, routinely and systematically directing licensed dealers[6] (who are charged with the tax collection function) (including respondent dealer) to deny tax credit against Florida use tax to interstate lessees (such as petitioner) for the sales tax that they previously paid upfront to another state when they entered into their leases. This policy is openly expressed in a series of Technical Assistance Advisements ("TAA") promulgated by the FLDOR, one of which is reproduced in the Appendix at App. 7.

In 1995, the petitioner, then a resident of New York, leased a car from the respondent dealer. The jurisdiction where a lease originates will often assert the right to impose a sales tax on all lease payments due under the lease, even where the leased property will be used outside the jurisdiction.[7] New York did – and still does – exactly that. As explained in 20 NYCRR §527.15:

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[6] §212.06(2)(e), Fla. Stat., defines a "dealer" as "any person . . . who leases or rents tangible personal property . . . for consideration, permitting the use or possession of such property without transferring title thereto . . . " §212.07(1)(a), Fla. Stat., in turn, requires that sales/use tax "be collected by the dealers from the purchaser or consumer."

[7] See *Intel Containers Int'l v. Huddleston*, 507 U.S. 60 (1993). Other populous states (besides New York) that impose sales tax on leases upfront include, without limitation, Texas, Ohio and Illinois.

> Section 1111(i) of the Tax Law provides special rules for the payment of sales and use tax on certain leases of motor vehicles, vessels and noncommercial aircraft. Rather than the tax being due upon each periodic lease payment, the Tax Law provides that . . . the tax is due at the inception of the lease on the total amount of the lease payments for the entire term of the lease.

Accordingly, the New York sales tax (at the then prevailing rate of 8½%) on the entire stream of lease payments for the entire 36-month lease term was paid at the inception of the lease. A little over a year later, in 1996, the petitioner moved to Florida taking the leased car with him, whereupon the respondent dealer, consistent with the FLDOR policy directive inherent in the TAA, sought to collect Florida use tax (at the then prevailing rate of 6%) from petitioner on each of the remaining periodic monthly lease payments, refusing to give him tax credit for the New York sales tax previously paid on those same lease payments. Respondent dealer thus sought to impose a cumulative tax burden upon petitioner of 14½% (8 ½% New York tax plus 6% Florida tax) as compared to the purely intrastate Florida lessee who pays but a single 6% tax. Petitioner, having previously paid 8½% New York sales tax on the entire stream of lease payments for the entire lease term, disputed and refused to pay the additional 6% Florida use tax. Approximately 20 months later, in 1998, the respondent dealer declared the lease in default based solely upon the unpaid Florida use tax for the 20-month period and repossessed the car.

In early 2000, the respondent dealer sued petitioner in the Palm Beach County Court for breach of contract asserting as the sole basis for the alleged breach the petitioner's nonpayment of the Florida use tax and seeking

recovery of the unpaid Florida use tax as part of its damages (R[8]-I, 1-10).[9] Petitioner answered and counterclaimed, asserting that it was the respondent dealer who instead breached the lease by repossessing the car based solely upon the unpaid Florida use tax, since petitioner was entitled to, but was not given, tax credit against the Florida use tax for the New York sales tax that he previously paid in full at the inception of the lease (R-I, 11-20).

Petitioner timely and properly raised the federal question presented here, *i.e.*, that Florida's refusal to give tax credit against its use tax for sales tax previously paid to another state violates the dormant Commerce Clause of the Federal Constitution, no fewer than seven times in the three Florida courts below. In each instance, the Florida courts below buried their head ostrich-like in the sands of oblivion, pretending as though the federal question was never raised. Consistent with Rule 14(g)(i) of this Court, the following narrative describes each of the seven instances in which the petitioner raised the federal question.

Petitioner initially raised the federal question in the court of first instance, *i.e.*, Palm Beach County Court, in his response to the respondent dealer's initial summary judgment motion (R-II, 164-212). In mid-2000, respondent dealer moved for summary judgment dismissing petitioner's counterclaims, relying upon the TAA (App. 7) in support of its assertion that it was required by FLDOR to

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[8] References to "(R-)" refer to the Record on Appeal in the Appellate Division of the Circuit Court with the appropriate volume and page number noted.

[9] §212.07(2) provides, in pertinent part, that "such tax . . . shall be a debt from the purchaser or consumer, until paid, and shall be recoverable at law in the same manner as other debts."

collect Florida use tax from petitioner on the lease payments accruing while the car was in Florida notwithstanding petitioner's previous payment of New York sales tax for the entire lease term (R-I, 106-131). The TAA addresses an identical but otherwise unrelated case involving another individual who, like the petitioner, paid New York sales tax on the entire stream of lease payments for the entire lease term, and later moved to Florida with his leased car. The TAA concludes that this individual was not entitled to tax credit for the New York sales tax previously paid and that his lessor was correct in charging Florida use tax (App. 15a). In his response to the motion, petitioner pointed out that the TAA arrives at that conclusion by confusing Florida's unlimited statutory credit provision (§212.06(7), Fla. Stat.) with Florida's other (and more limited) use tax exemption (for property purchased outside the state by former nonresidents if the property has been used outside the state for six months or longer before being imported into Florida) (§212.06(8)(a), Fla. Stat.). Petitioner argued that by denying tax credit to interstate lessees and thereby subjecting them to cumulative sales and use taxes not similarly borne by intrastate lessees, the TAA construes the statute in a way that violates the cardinal Commerce Clause requirement of nondiscrimination. The petitioner cited *Complete Auto Transit v. Brady*, 430 U.S. 274 (1977) (establishing the four-prong test for the constitutionality of a state tax), *Container Corp. v. Franchise Tax Board*, 463 U.S. 159, 169 (1983) (establishing the internal consistency test for determining whether a tax unconstitutionally discriminates against interstate commerce; to be internally consistent, a state tax must impose no greater burden upon interstate commerce than intrastate commerce), and *Jefferson Lines*, 514 U.S. 175 (reaffirming the internal consistency doctrine). Completely

ignoring these binding precedents (and the federal question itself), the County Court concluded that petitioner was not entitled to tax credit against Florida use tax for the New York sales tax previously paid (and implicitly concluded that petitioner thus defaulted on the lease by not paying the Florida tax), and granted summary judgment to respondent dealer (App. 2).

Petitioner raised the federal question for the second time in early 2001 when he made a motion (still in the court of first instance) for leave of court to amend his answer to assert the federal question as an affirmative defense (R-II, 305-340). The County Court denied petitioner's motion without acknowledging the federal question (R-II, 341).

A month or so later, the County Court granted respondent dealer's further motion for final summary judgment on the complaint stating that "the court has previously ruled that [petitioner] defaulted" (App. 3). After a brief evidentiary hearing in 2003 on the issue of damages, the court entered final judgment against the petitioner (R-XIX, 301).

Petitioner raised the federal question for the third time in the appellate briefs submitted in his appeal to the Appellate Division of the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida (and at oral argument thereon). The petitioner argued that the lower court, in holding that petitioner was not entitled to tax credit for the New York sales tax previously paid, construed the statute in a way that violates the Commerce Clause. The petitioner relied principally upon this Court's decision in *Jefferson Lines*, 514 U.S. 175, which reaffirmed the internal consistency doctrine and also strongly implies,

albeit in dicta, that tax credit against use tax for sales tax previously paid to another state is constitutionally required.[10] The petitioner also relied upon *Barringer v. Griffes*, 1 F.3d 1331 (2d Cir. 1993), *cert. denied*, 510 U.S. 107 (1994), which applied the internal consistency doctrine in invalidating Vermont's denial of tax credit against its use tax for motor vehicles registered in the state for sales taxes paid to another state where the vehicle was previously registered. In reaching that result, the *Barringer* Court observed: "absent a credit for taxes paid in other states, multiple taxation would heavily burden vehicles transported in interstate commerce, precisely the result that the Commerce Clause was designed to prevent." *Id.* at 1337. The petitioner also relied upon *Dep't of Revenue v. Kuhnlein*, 646 So.2d 717 (Fla. 1994), a decision from Florida's own Supreme Court explicitly adopting this Court's internal consistency doctrine. The *Kuhnlein* Court explained that in order to avoid an internal consistency problem, "Florida law [referring to §212.06(7), Fla. Stat.] provides that, once use tax is applicable, credit must be given for any "like tax" paid to another American jurisdiction that is equal to or greater than Florida's tax." *Id.* at 723. Petitioner also pointed out that the type of transaction, *e.g.*, sale, lease, etc., in which the original sales tax was paid is irrelevant to the Commerce Clause analysis. The Circuit Court not only ignored these authorities but also ignored the federal question altogether in affirming the lower court's judgments *per curiam* (without issuing written opinion) (App. 1).

The petitioner raised the federal question for the fourth time in his motion for rehearing/request for a

[10] For more extensive treatment, see pp. 18-21, *infra*.

written opinion, in which he again cited *Jefferson Lines* for the proposition that under Commerce Clause requirements "use tax would not apply when another state's sales tax had previously been paid, or would apply subject to credit for such payment." *Jefferson Lines*, 514 U.S. at 194. The Circuit Court denied petitioner's motion for rehearing without acknowledging the federal question (App. 4).

Petitioner raised the federal question for the fifth time in his timely petition for a writ of certiorari to the District Court of Appeal of the State of Florida, Fourth District. In his petition, petitioner essentially repeated the arguments made in the courts below. The court denied the petition without acknowledging the federal question (App. 5). Petitioner raised the federal question for the sixth time in his motion for rehearing that the court denied without acknowledging the federal question (App. 6).

Petitioner raised the federal question for the seventh – and final – time in his request to the District Court of Appeal of the State of Florida, Fourth District, for certification that the federal question was raised and necessarily decided in the Florida courts below. In support of that request, petitioner pointed to each of the six previous instances in which the federal question was raised. The court denied the request for certification without acknowledging the federal question (App. 6).[11]

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[11] Because the District Court of Appeal of the State of Florida did not issue a written opinion in connection with its denial of certiorari, the petitioner is precluded under the Florida Constitution from seeking Florida Supreme Court review. See Art. V, §3(b)(3), Fla. Const.

REASONS FOR GRANTING THE WRIT

I. THIS CASE SQUARELY PRESENTS AN ISSUE THAT THE COURT PREVIOUSLY FOUND TO BE CERTWORTHY.

Twenty years ago, in *Williams v. Vermont*, 472 U.S. 14 (1985), the Court granted certiorari on the same Commerce Clause issue presented here as well as an equal protection issue. The *Williams* Court resolved the case on equal protection grounds, noted its narrow holding and concluded by emphasizing what it did not decide: "This Court has expressly reserved the question whether a State must credit a sales tax paid to another state against its own use tax." *Id.* at 21-22 (citing *Henneford*, 300 U.S. at 587). The *Williams* Court, while noting that such a requirement had significant support in the commentary,[12] put aside the question leaving it open for future resolution. *Id.* at 22. This question has been percolating for almost seventy years since Justice Cardozo first posited it in *Henneford*. During – and perhaps as a result of – the Court's dormancy on the question, various state tax authorities, including FLDOR here, have operated as though there were no constitutional requirement for credit. This has resulted in millions of interstate lessees being subjected to cumulative – and discriminatory – sales

[12] Citing, *inter alia*, J. Hellerstein & W. Hellerstein, *State and Local Taxation* 637-638 (4th ed. 1978). Professor Walter Hellerstein is the country's leading commentator on state and local taxation. His treatise is generally regarded as the "bible" of state taxation and is frequently cited by this Court. See, *e.g.*, *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 463 (citing Hellerstein treatise); *Jefferson Lines*, 514 U.S. at 180, 194 (citing Hellerstein treatise). Professor Hellerstein's more recent commentary on the issue is contained in the current edition of his treatise, *State Taxation* ¶18.08[2] (3rd ed. 2003).

and use tax burdens. The time is now ripe for the Court to reassert its authority and fully settle this question; this case presents the ideal vehicle for doing so.

II. THIS CASE PRESENTS ISSUES OF NATIONAL IMPORTANCE, GOING TO THE HEART OF THE INTERESTS PROTECTED BY THE COMMERCE CLAUSE.

It must be conceded at the outset that there is no *express* conflict between the decision below and other appellate courts. Nor could there be; a conflict cannot be created where, as here, the court below simply ignores the federal question. A state court's refusal or failure to articulate its denial of the federal claim is just as reviewable as an express decision on the point. It is enough that "the necessary effect of the judgment has been to deny the claim." *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928). See also, *Chambers v. Mississippi*, 410 U.S. 284, 290 n. 3 (1973); *Street v. New York*, 394 U.S. 576, 581-585 (1969).

The Court, recognizing the vital interests protected by the Commerce Clause, has repeatedly signaled its distaste for discriminatory state taxing schemes by granting certiorari in numerous other cases raising similar interstate commerce concerns even in the absence of an asserted conflict among appellate courts. See, *e.g.*, *American Trucking Ass'ns v. USF Holland* (Case No. 03-1230); *Hillside Diary, Inc. v. Lyons*, 539 U.S. 59 (2003); *Camps Newfoundland/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564 (1997); *General Motors v. Tracy*, 519 U.S. 278 (1997); *American Trucking Ass'ns v. Scheiner*, 483 U.S. 266 (1987).

This case presents a question whose resolution will have immediate importance far beyond the facts and parties involved. The decision below sanctions the cumulative – and discriminatory – sales and use tax burdens which result from FLDOR's practice of directing licensed dealers, including the respondent dealer, to collect use taxes from interstate lessees, such as the petitioner, without tax credit for the sales taxes that they previously paid to another state. Florida is not alone in this practice. The practice is far more pervasive; other states, including most notably California, also engage in the same discriminatory practice of imposing its own use tax upon lessees migrating to that state from other states without giving them tax credit for the sales tax that they previously paid upfront to such other states.[13]

If the decision below is left standing, other state tax commissioners not currently engaged in this discriminatory practice will then adopt it. This will inevitably lead to the proliferation of cumulative sales and use taxes on a nationwide basis; every state would then tax the use of property within its borders irrespective of the sales tax previously paid to another state. In such an environment, no rational consumer would ever purchase (or lease) property in any state other than the state in which they intend to use that property, knowing that if they did, they would have to pay two taxes; first a sales tax in the state of purchase (or lease) and then a use tax in the state of use. Instead of having a national common-market economy where consumers in one state freely do business

[13] See, *e.g.*, *In the Matter of the Petition of Sandra Ann Torquato*, New York Tax Appeals Tribunal, 2000 N.Y. Tax LEXIS 283 (2000), which is reproduced in the Appendix at App. 8.

with merchants in any other state, we would have 51 economically Balkanized states (including the District of Columbia) where consumers in one state, to avoid double taxation, would only do business with merchants in that same state.

To illustrate the breadth of the problem, and thus the importance of the issue presented, we endeavor here to quantify the number of interstate lessees who, like petitioner, have been caught in the morass of cumulative sales and use taxes. While it is neither necessary nor appropriate – nor for that matter, even possible – within the context of this petition to catalogue each of the cumulative sales and use tax burdens that might potentially result from each of the 2,070 possible permutations of state-to-state migration (a citizen of any one of the 46 jurisdictions that impose sales/use tax could move to any one of the other 45 jurisdictions that impose sales/use tax; 46 multiplied by 45 equals 2070), for our purposes here, it is sufficient to note that the problem exists among three of the nation's most populous states (New York, California and Florida). We have thus limited the analysis that follows to these three states. The problem appears to be most pronounced between New York and Florida (as in this case) since New York, which imposes its sales tax on leases upfront, has the largest outmigration to nearly every other state (especially Florida), whereas Florida, which imposes its sales/use tax on leases on a periodic basis, has the largest inmigration from nearly every other state (especially New York).[14] According to the U.S. Census Bureau, during the 1995-2000 period, some 308,230 people

[14] U.S. Census Bureau, *State-to-State Migration Flows: 1995-2000* (2003), available at http://www.census.gov/prod/2003pubs/censr-8.pdf

migrated from New York to Florida (mostly elderly retirees), and an additional 95,952 people migrated from New York to California.[15] According to leasing industry statistics, during this same period, leasing accounted for roughly 30% of all new car acquisitions.[16] Using official government statistics as to the average number of persons per household (2.59)[17] and the average number of vehicles per household (1.9),[18] we are thus able to calculate that, during this same 1995-2000 period, in excess of 88,000 lessees moved from New York to either of Florida or California. We note that this analysis understates – probably substantially so – the full impact of the problem since the analysis does not consider the leasing of boats and noncommercial aircraft which are also subject to the accelerated payment of sales tax in New York. This estimate involves only three states (6 permutations of state-to-state migration) over a five-year period. When one considers the remaining number of permutations (2064) of state-to-state migration that were not considered in deriving this estimate and broadens the timeframe beyond the five-year period sampled, it is hardly a stretch to conclude that millions of interstate lessees have been – and continue to be – subjected to cumulative sales and use taxes.

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[15] *Id.*

[16] Source: CNW Marketing/Research, *Consumer New Vehicle Leasing, Lease Share: of Retail, 1990-2004.*

[17] U.S. Census Bureau, *People QuickFacts* (2003), available at http://quickfacts.census.gov/qfd/states/00000.html

[18] U.S. Dept. of Transportation, Federal Highway Administration, *Average Number of Vehicles and Vehicle Travel Per Household* (2001).

Several macroeconomic and demographic factors combine to all but assure that the problem of cumulative sales and use taxes will only grow worse, underscoring the need for a nationally binding rule of law requiring the provision of tax credit against the a state's use tax for sales taxes previously paid to another state irrespective of the type of transaction involved. The first factor is the overwhelming dominance of sales and use tax as a state revenue source. Using Florida as an example, for the most recent fiscal year, sales and use taxes accounted for a record 70% of the state's gross revenues.[19] The second factor is the even greater dominance of personal consumption expenditures, *i.e.*, retail sales, as a percentage of GDP. For the most recent period, personal consumption expenditures accounted for a record 70% of GDP.[20] The third factor is the dominance of auto sales (and leases) as a percentage of retail sales. Again using Florida as an example, in 2003, auto dealership sales (and leases) accounted for nearly 23% of overall retail sales in the state.[21] The fourth factor is the significant use of leasing as a means of auto acquisition, accounting for approximately 30% of all new car acquisitions. The fifth factor is the ever-accelerating trend in state-to-state migration. Again using Florida as an example, during the 90's, migration accounted for 85.3% of the state's population increase whereas in the more recent period from April 1, 2000 to April 1, 2004, migration

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[19] Source: Florida Dept. of Revenue, *2003-04 Annual Report*.

[20] Source: Federal Reserve Bank of St. Louis, available at http://research.stlouisfed.org/fred2/series/GDP/18.

[21] Source: National Automobile Dealers Association (NADA), Industry Analysis Division, *Relationship of new-car dealerships to total retail trade in 2003, by state*.

accounted for 89.5% of the state's population increase.[22] As each of these trends continue to accelerate, so too does the potential for the imposition of cumulative sales and use taxes, further underscoring the necessity for a resolution of the issue presented by this case.

III. THE DECISION BELOW COMPLETELY IGNORES THIS COURT'S COMMERCE CLAUSE JURISPRUDENCE.

Petitioner relied upon the four-part Commerce Clause test first articulated in *Complete Auto Transit* under which a state tax will be deemed unconstitutional unless it "[1] is applied to an activity with a substantial nexus with the taxing State, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is fairly related to the services provided by the State." *Jefferson Lines*, 514 U.S. at 183 (quoting *Complete Auto Transit*, 430 U.S. at 279). This case involves the second and third prongs of the *Complete Auto* standard, the requirements of apportionment and nondiscrimination.

Satisfaction of these requirements, in turn, may be determined by application of what the Court has termed the "internal consistency" test. As the Court explained:

> Internal consistency is preserved when the imposition of a tax identical to the one in question by every other State could add no burden to interstate commerce that intrastate commerce would not also bear. This test asks nothing about the

[22] Office of Economic and Demographic Research, Florida Legislature, *Florida Demographic Summary* (2005), at http://www.state.fl.us/edr/population/popsummary.pdf

> degree of economic reality reflected by the tax, but simply looks to the structure of the tax at issue to see whether its identical application by every other State in the Union would place interstate commerce at a disadvantage as compared with commerce intrastate.

Jefferson Lines, 514 U.S. at 185. Because a state tax that fails the internal consistency test places interstate commerce at an insuperable structural disadvantage, failure of that test demonstrates that the tax both discriminates against interstate commerce and is malapportioned. See *Tyler Pipe Indus., Inc. v. Washington State Dep't of Revenue*, 483 U.S. 232, 247 (1987) (noting the test's application to both the nondiscrimination and apportionment requirements).

The conclusion that a state is constitutionally required to provide credit against its own use taxes for sales taxes paid to other states follows inexorably from the simple application of the internal consistency principle. If one views use taxes in conjunction with the sales taxes for which they compensate, the sales-use tax scheme would subject the purchase (or lease) of goods in one state for use in another to two exactions – a sales tax in the state of purchase (or lease) and a use tax in the state of use. The purchase (or lease) of goods for local use, however, would be subject to only a sales tax. If one views use taxes in isolation from the sales taxes, use taxes would still subject the interstate user to the risk of multiple taxation not borne by their intrastate counterpart. The interstate user pays a tax in each state in which the property is used whereas the intrastate user using the property in an identical fashion, except not across state lines, would pay but a single tax. Under either view of the use tax, the

competitive disadvantage to interstate commerce is self-evident. As Justice Scalia observed in *Tyler Pipe*, if the Court "had applied an internal consistency rule" in *Williams*, 472 U.S. 14, where the Court found it unnecessary to reach the question of whether a state must credit a sales paid to another state against its own use tax, "the need for such a credit would have followed as a matter of mathematical necessity." *Tyler Pipe*, 483 U.S. at 255 (Scalia, J., concurring in part and dissenting in part). Applying the internal consistency test, the Second Circuit similarly noted "absent a credit for taxes paid in other states, multiple taxation would heavily burden vehicles transported in interstate commerce, precisely the result the Commerce Clause was designed to prevent." *Barringer*, 1 F.3d at 1337.

The type of transaction (*e.g.* sale, lease, etc.) in which the original sales tax was paid is constitutionally irrelevant to the main question presented here, *i.e.*, whether a state's failure to provide credit against its use tax for sales tax previously paid to another state violates the dormant Commerce Clause. The internal consistency doctrine is consistent in its application across the entire spectrum of consumer and commercial transactions, including leases; the doctrine does not discriminate among transaction types in determining whether a tax discriminates against interstate commerce.

The Court's opinion in *Jefferson Lines* reinforces the conclusion that states have a constitutional obligation to provide a credit against their own use taxes for sales or use taxes paid to other states. The *Jefferson Lines* Court declared that "equality of treatment between interstate and intrastate activity has been the common theme among

the paired (or 'compensating') tax schemes that have passed constitutional muster" and noted that in upholding taxing schemes providing for credits for taxes on in-state transactions, it had "often pointed to the concomitant credit provisions for taxes paid out-of-state as supporting our conclusion that a particular tax passed muster because it treated out-of-state and in-state taxpayers alike." *Jefferson Lines*, 514 U.S. at 193 n. 6. The *Jefferson Lines* Court also noted that it had "never upheld a tax in the face of a substantiated charge that it provided credits for the taxpayer's payment of in-state taxes, but failed to extend such a credit for out-of-state taxes." *Id.* Under Commerce Clause requirements, use tax "presumably . . . would not apply when another State's sales tax had been previously paid, or would apply subject to a credit for such payment." *Id.* at 194.

The decision below construes the statutory framework as, in effect, creating a special rule for the tax treatment of out-of-state leases ("the rental or lease of tangible personal property which is used or stored in this state shall be taxable without regard to its prior use or tax paid on purchase *outside the state*") (*emphasis supplied*) that cannibalizes the statutory credit provision (§212.06(7), Fla. Stat.) (App. 3a-4a). Construed this way, the statute discriminates *on its face* against interstate commerce since it only disallows credit for tax paid *outside the state*, thus explicitly subjecting out-of-state lessees to higher tax burdens than local lessees. Such a facially discriminatory construction would, of course, render the statute invalid

per se.[22] See *Camps Newfoundland*, 520 U.S. 564. But that is not the proper statutory construction.

It is a cardinal rule of statutory construction that when two or more interpretations of a statute are possible and one of them would lead to the statute being held unconstitutional, the court should choose the interpretation which would be constitutional. See *Gomez v. United States*, 490 U.S. 858, 864 (1989). A constitutional interpretation of Florida's statutory framework is possible if one reads the provision cited by the court below ("the rental or lease of tangible personal property which is used or stored in this state shall be taxable without regard to its prior use or tax paid on purchase outside the state"), not as cannibalizing the statutory credit provision (as the decision below does) but instead in its proper context, as limiting the scope of Florida's other exemption from use tax (for property purchased outside the state by former nonresidents if the property has been used outside the state for six months or longer before being imported into Florida (§212.06(8)(a), Fla. Stat.)) to purchased property (as opposed to leased property). Because this §212.06(8)(a) exemption exists as a matter of legislative prerogative (unlike the statutory credit provision which exists as a matter of constitutional imperative), there is no constitutional obstacle to limiting

[22] Some justices have expressed the belief that negative Commerce Clause jurisprudence is misguided but have indicated that they will nevertheless enforce it on *stare decisis* grounds against, *inter alia*, a state law that facially discriminates against interstate commerce. See *General Motors. v. Tracy*, 519 U.S. at 312 (Scalia, J., concurring). Since the court below construed the statute in a way that would render the statute facially discriminatory, even those justices who do not subscribe to the internal consistency doctrine should have no trouble finding a Commerce Clause violation here.

the availability of the §212.06(8)(a) exemption to purchased property only. The petitioner, as a lessee, is admittedly not entitled to (and thus never claimed) the §212.06(8)(a) exemption (because leased property is involved); he is, however, entitled to the §212.06(7) credit against the Florida use tax for the New York sales tax previously paid (notwithstanding that leased property is involved).

The decision below affirming the holding that petitioner was not entitled to tax credit against Florida use tax for the New York sales tax previously paid on the entire stream of lease payments is incompatible with this Court's Commerce Clause jurisprudence.

CONCLUSION

For all of the foregoing reasons, petitioner respectfully asks this honorable Court to grant the petition.

Respectfully submitted,

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Boca Raton, Florida 33428
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Counsel of Record for Petitioner

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APPENDIX 1

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

RICHARD D. COHEN,

Appellant,

v.

WORLD OMNI FINANCIAL CORP.,

Appellee. /

APPELLATE DIVISION
(CIVIL)
CASE NO.
502003AP.001685XXCCAY

Opinion Filed: Aug. 02, 2004

Appeal from The County Court of the Fifteenth Judicial Circuit Court in and for Palm Beach County, Florida, Judge Susan Lubitz & Judge Joseph Marx.

For Appellant, Richard D. Cohen, Esq., 21870 Cartagena Drive, Boca Raton, FL 33428.

For Appellee, Mitchell Cusid, 7000 West Palmetto Park Road, Boca Raton, FL 33433.

PER CURIAM.

AFFIRMED.

MCCARTHY, CROW, & STERN, JJ., concur.

APPENDIX 2

IN THE COUNTY COURT IN AND FOR PALM BEACH COUNTY, FLORIDA

CIVIL DIVISION

CASE NO. SC 00 124 RD

WORLD OMNI FINANCIAL CORP.,

Plaintiff,

vs.

RICHARD D. COHEN,

Defendant. /

ORDER GRANTING FINAL SUMMARY JUDGMENT

THIS case came before the court for hearing on Plaintiff's Motion For Summary Judgment On Defendant's Counterclaim. Counsel for Plaintiff/Counter Defendant, World Omni Financial Corp. ("World Omni"), and defendant/counter plaintiff, Richard Cohen ("Cohen"), appeared. The court, having considered the pleadings, affidavits, statutes, administrative codes, and other documents in the court record, finds as follows:

FACTS

Cohen's Countrclaim is based upon his allegation that he made the monthly payments under the terms of the Closed End Motor Vehicle Lease Agreement For Land Rover Vehicles ("Lease" Exhibit A, attached to the Complaint) and that World Omni wrongfully repossessed his

vehicle. Count 1, Breach Of The Lease, alleges that Cohen made all payments under the Lease; Count 2, Breach Of The Lease, alleges that Cohen was entitled to a tax refund for a portion of the New York State sales tax that was included in the monthly payments; Count 3, alleges that World Omni committed liable by notifying third parties of the default and repossession.

There is no genuine issue as to any material fact. It is uncontradicted that Cohen failed to pay the entire monthly lease payments when World Omni increased the lease payments to include a 6% sales and use tax imposed by Florida law. World Omni repossessed and sold the vehicle. Cohen alleges either that he was not required to pay the Florida sales and use tax on the Lease or that he was entitled to a refund on a portion of the New York sales tax which was paid at the inception of the lease.

CONCLUSIONS OF LAW

The Lease permits World Omni to change the monthly payments for increases or decreases in taxes (paragraph 26). The State of Florida required World Omni to collect the sales and use tax on the leased vehicle when Cohen moved to Florida. Section 212.06(8)(a), Fla. Stat., states "The rental or lease of tangible personal property which is used or stored in this state shall be taxable without regard to its prior use or tax paid on purchase outside this state."; See also Section 12A-1.000 (14), FAC. Payment of the New York Lease [sic] [sales tax] was due at the inception of the lease on the total amount of the base payments for the entire term of the lease. State-Reg., NY Tax RPTR (Doc. 11); In the matter of Petition on of Jennifer Miehle, State of New York, Division of Tax Appeals, attached to Defendant's

Cross Motion For Summary Judgment Dismissing The Complaint. Cohen has presented no authority to support his claim that he was entitled to a credit for the payment of the New York sales tax which was paid by World Omni and then prorated in his monthly payments.

Based on the foregoing, it is

ORDERED AND ADJUDGED that plaintiff's Motion For Judgment on the Counterclaim is granted.

DONE AND ORDERED in Delray Beach, Palm Beach County, Florida this 11 day of July, 2000.

/s/ Susan Lubitz
SUSAN LUBITZ
COUNTY COURT JUDGE

Copies furnished:

Michael Chusid, Esq.
7000 West Palmetto Park Road, Ste. 400
Boca Raton, Fl 33433

Richard D. Cohen
21870 Cartagena Drive
Boca Raton, Fl 33428

APPENDIX 3

IN THE COUNTY COURT IN
AND FOR PALM BEACH
COUNTY, FLORIDA

CIVIL DIVISION

CASE NO. SC 00 124 RD

WORLD OMNI
FINANCIAL CORP.,

Plaintiff,

vs.

RICHARD D. COHEN,

Defendant. /

ORDER ON PLAINTIFF'S MOTION FOR FINAL SUMMARY JUDGMENT

THIS case came before the court for hearing on Plaintiff's Motion for Final Summary Judgment. Plaintiff's counsel and Defendant Richard D. Cohen appeared.

The court, having considered argument, the record, and previous rulings, it is

ORDERED AND ADJUDGED as follows:

1. Plaintiff's Motion for Final Summary Judgment is granted on the issue of liability, as the court has previously ruled that Defendant Richard D. Cohen defaulted on the loan [sic] [lease] and the vehicle was repossessed in accordance with the contract and the laws of New York and Florida.

2. Plaintiff's Motion for Final Summary Judgment is denied on the issue of standing and damages, as there are genuine issues of disputed material facts.

DONE AND ORDERED in Delray Beach, Palm Beach County, Florida this 9 day of April, 2001.

/s/ Susan Lubitz
SUSAN LUBITZ
COUNTY COURT JUDGE

Copies furnished:

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Ritter Chusid Bivona & Cohen LLP
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APPENDIX 4

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA

APPELLATE DIVISION
(CIVIL)
CASE NO.
502003AP001685XXCCAY

RICHARD D. COHEN,

Appellant,

v.

WORLD OMNI FINANCIAL CORP.,

Appellee. /

BY ORDER OF THE COURT:

THIS CAUSE came before the Court upon Appellant's Motion for Rehearing-Request for Written Opinion. The Court, having reviewed the Motion and the Response, and being advised of the matter, it is

ORDERED and ADJUDGED that Appellant's Motion for Rehearing-Request for Written Opinion is **DENIED.** The Court need not issue a written opinion to explain what is apparent from the record. *Horn v. Marine Hospitality Corporation*, 745 So.2d 329 (Fla. 4th DCA 1998).

DONE: AUG. 31, 2004

cc:

Richard D. Cohen, Esq., 21870 Cartagena Drive, Boca Raton, FL 33428.

Mitchell Chusid, 7000 West Palmetto Park Road, Boca Raton, FL 33433.

APPENDIX 5

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA FOURTH DISTRICT, P.O. BOX 3315, WEST PALM BEACH, FL 33402

February 15, 2005

CASE NO.: 4D04-3704
L.T. NO.: 2003 AP 001685 AY

RICHARD D. COHEN, v. WORLD OMNI FINANCIAL CORP.,

Appellant/Petitioner(s), Appellee/Respondent(s).

BY ORDER OF THE COURT:

ORDERED that petitioner's February 2, 2005, Motion to Disqualify Judge Melanie G. May is hereby granted; further,

ORDERED that petitioner's motion to stay proceedings pending certiorari review is hereby denied as moot; further,

ORDERED that petitioner's motion for attorney's fees on appeal is hereby denied; further,

ORDERED that respondent's motion for attorney's fees filed November 22, 2004, is granted. On remand the trial court shall set the amount of the attorney's fees to be awarded for this appellate case. If a motion for rehearing is filed in this court, then services rendered in connection therewith, including preparation of a response may be taken into account in computing the amount of the fee; further,

ORDERED that petitioner's request for oral argument is hereby denied; further,

ORDERED that petitioner's emergency motion to expedite is hereby denied as moot; further,

ORDERED that the petition for writ of certiorari is hereby denied. *See Haines City Community Dev. v. Heggs*, 658 So. 2d 523 (Fla. 1995); *City of Deerfield Beach v. Vaillant*, 419 So. 2d 624 (Fla. 1982).

I HEREBY CERTIFY that the foregoing is a true copy of the original court order.

Served:

Richard D. Cohen Mitchel Chusid Sharon R. Brock, Clerk

dl [SEAL]

/s/ Marilyn Beuttenmuller
MARILYN BEUTTENMULLER,
Clerk
Fourth District Court of Appeal

APPENDIX 6

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA FOURTH DISTRICT, P.O. BOX 3315, WEST PALM BEACH, FL 33402

March 29, 2005

CASE NO.: 4D04-3704
L.T. NO.: 2003 AP 001685 AY

RICHARD D. COHEN, v. WORLD OMNI FINANCIAL CORP.,

Appellant/Petitioner(s), Appellee/Respondent(s).

BY ORDER OF THE COURT:

ORDERED that petitioner's motion filed February 24, 2005, for rehearing-request for written opinion is hereby denied; further,

ORDERED that petitioner's first supplement filed March 1, 2005, to petitioner's motion for rehearing-request for written opinion is hereby denied; further,

ORDERED that petitioner's request filed March 7, 2005, in the alternative, for certificate certifying that a federal question was raised and decided is hereby denied; further,

ORDERED that petitioner's request filed March 15, 2005, for permission to reply to respondent's opposition to petitioner's request for a certificate certifying that a federal question was raised and decided is hereby denied.

I HEREBY CERTIFY that the foregoing is a true copy of the original court order.

Served:

Richard D. Cohen Mitchel Chusid

cd [SEAL]

/s/ Marilyn Beuttenmuller
MARILYN BEUTTENMULLER,
Clerk
Fourth District Court of Appeal

APPENDIX 7

State of Florida
Department of Revenue

May 15, 1998

Re: Technical Assistance Advisement 98A-037
Sales and use Tax
Lease of Motor Vehicle
Section 212.06(7) & (8), F.S.

Dear [Name(s) Intentionally Omitted in Original]:

This Technical Assistance Advisement is in response to your letter of February 16, 1998, in which you seek advice as to the taxable status of an automobile lease in which you are the lessee. Your letter provides in pertinent part:

> 1. Under a New York Motor Vehicle Lease Agreement dated December 12, 1996 (the lease agreement), I am currently leasing a 1997 Toyota Avalon . . . XXX [the "Lessor"]. . . .
>
> 2. As per the terms of the lease agreement, I paid to the State of New York $1,211.81 (assessed at 8½%) representing "Sales/Use/Excise Taxes". I made this payment concurrent with the signing of the lease agreement.
>
> 3. My wife has been the driver of the leased vehicle since inception of the lease agreement. My wife and 2 sons relocated to the State of Florida during November 1997; this necessitated my garaging (and registration) of the leased vehicle in Florida for her continued use.
>
> 4. I presently work in New York and as the lessee under the lease agreement, I continue to make my monthly lease payments from New York.

5. Commensurate with my garaging and registration of the leased vehicle in Florida [Lessor] has assessed an additional 6% tax on my monthly lease payment representing Florida Sales/Use Tax. [Lessor] states that the additional tax is pursuant to Section 212.06(8)(a), F.S. of the Florida Sales and Use Tax Act.

6. After carefully reviewing applicable sections of the Florida Sales and Use Tax Act, I have concluded that the additional assessment is incorrect and accordingly, I have formally disputed the assessment with the lessor.

You also provided a copy of your lease agreement which shows a lease term of thirty-six (36) months.

DISCUSSION

Section 212.06, F.S., provides in part:

(7) The provisions of this chapter do not apply in respect to the use or consumption of tangible personal property, or distribution or storage of tangible personal property for use or consumption in this state, upon which a like tax equal to or greater than the amount imposed by this chapter has been lawfully imposed and paid in another state, territory of the United States, or the District of Columbia. . . . If the amount of tax paid in another state, territory of the United States, or the District of Columbia is not equal to or greater than the amount of tax imposed by this chapter, then the dealer shall pay to the department an amount sufficient to make the tax paid in the other state, territory of the United States, or the District of Columbia and in this

> state equal to the amount imposed by this chapter.
>
> (8) (a) Use tax will apply and be due on tangible personal property imported or caused to be imported into this state for use, consumption, distribution, or storage to be used or consumed in this state; provided, however, that, . . . , it shall be presumed that tangible personal property used in another state, territory of the United States, or the District of Columbia for 6 months or longer before being imported into this state was not purchased for use in this state. **The rental or lease of tangible personal property which is used or stored in this state shall be taxable without regard to its prior use or tax paid on purchase outside this state.** (emphasis supplied)

Rule 12A-1.007(14), F.A.C., provides in part:

> (a) The rental or lease of an aircraft, boat, mobile home, or motor vehicle, which is used or stored in this state, shall be taxable without regard to its prior use or tax paid on the purchase outside this state.

It is the Department's position that the statute is clear in providing that a lease or rental of tangible personal property used or stored in Florida is taxable irrespective of its prior use or prior taxable status in another state. Therefore, your lessor is correct in charging you tax on your automobile lease.

Although it will not be of assistance, it may be of interest to you that the Florida Legislature in the 1998 legislative session, which ended on May 1, 1998, amended Section 212.06, F.S., to remove from the imposition of sales and use tax certain non-commercial motor vehicles leased in

excess of twelve (12) months. To avoid taxation, the motor vehicle must be used in another state and tax must be paid in the other state. Since your leased vehicle is registered and used in Florida, the lease payments continue to be taxable in Florida.

This response constitutes a Technical Assistance Advisement under s. 213.22, F.S. which is binding on the department only under facts and circumstances described in the request for this advice as specified in s. 213.22, F.S. Our response is predicated on those facts and the specific situation summarized above. You are advised that subsequent statutory or administrative rule changes or judicial interpretations of the statutes or rules upon which this advice is based may subject similar future transactions to a different treatment than expressed in this response.

You are further advised that this response and our request are public records under chapter 119, F.S., which are subject to disclosure to the public under the conditions of s. 213.22, F.S. Your name, address, and any other details which might lead to identification of the taxpayer must be deleted by the Department before disclosure. In an effort to protect the confidentiality of such information, we request you notify the undersigned in writing within 15 days of any deletions you wish made to the request or the response.

Sincerely,

Jonathan E. Swift
Tax Law Specialist
Technical Assistance and Dispute Resolution
(850) 922-4840

Control #33319

NOTICE UNDER THE AMERICANS WITH DISABILITIES ACT

Persons needing an accommodation to participate in any proceeding before the Tax Policy and Dispute Resolution Office, should contact that office at 904-488-0717 (voice), or 1-800-DOR-8331 (TDD), at least five working days before such proceeding. You may also call via the Florida Relay System at 1-800-955-8770 (voice), or 1-800-955-8771 (TDD).

APPENDIX 8

In the Matter of the Petition of SANDRA ANN TORQUATO for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Year 1998

DTA NO. 816973

STATE OF NEW YORK-TAX APPEALS TRIBUNAL

2000 N.Y. Tax LEXIS 283

October 12, 2000

PANEL:

[*1] Donald C. DeWitt, President; Carroll R. Jenkins, Commissioner; Joseph W. Pinto, Jr. Commissioner.

OPINION BY:

PER CURIAM

OPINION:

DECISION

Petitioner Sandra Ann Torquato, 24501 Heavenly Court, West Hills, California 91307, filed an exception to the determination of the Administrative Law Judge issued on March 30, 2000. Petitioner appeared *pro se*. The Division of Taxation appeared by Barbara G. Billet, Esq. (Justine Clarke Caplan, Esq., of counsel).

Neither party filed a brief. Oral argument was not requested.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether the Division of Taxation properly denied petitioner's application for a refund of a portion of the total sales tax paid at the inception of a motor vehicle lease agreement.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

On April 26, 1997, petitioner, Sandra Ann Torquato, entered into a lease agreement with Toyota Motor Credit Corporation for the lease of a 1997 Toyota Corolla. The lease provided for 36 monthly payments of $189.00 for a total lease amount $6,804.00. The lessor collected sales [*2] tax of $685.02 at the inception of the lease based on petitioner's total payment of $8,5359.07.[1]

There is no dispute that petitioner was a resident of New York State at the inception of the lease. Petitioner made eleven lease payments before she relocated to California in February 1998. Thereafter, petitioner's lease payments increased by $15.59 per month. Petitioner inquired and was advised by the lessor that the increase represented California sales tax on each of the remaining 25 lease payments, and that California "would not honor the prepaid state tax already paid to New York."

On March 18, 1998, petitioner filed an Application for Credit or Refund ("Form AU-11") seeking a refund of a

[1] The tax was imposed at the Nassau County rate of 8⅛% on the $6,804.07 total amount of the lease payments ($189.00/month x 36 months) plus petitioner's down payment amount of $1,255.00.

portion of the New York sales tax collected at the inception of the lease. Petitioner calculated the amount of refund claimed by dividing the total sales tax paid ($685.02) by the number of lease payments (36) to arrive at the amount of sales tax per month ($19.03). Petitioner multiplied such amount [*3] ($19.03) by the number of lease payments she made while in New York (11) to arrive at $209.31. Petitioner then subtracted such amount ($209.31) from the total sales tax paid ($685.02) to result in the amount of claimed refund ($475.71). In sum, petitioner takes the position that although the tax was paid at the inception of the lease, her move to California constituted a change of circumstances which should allow her to apportion the tax equally among each of the lease payments, to pay tax only on those payments made while she was living in New York, and to receive a refund of the balance of tax apportioned to those remaining payments made (or to be made) when petitioner was no longer living in New York.

The Division of Taxation ("Division") denied the refund claim by letter dated May 22, 1998 for the following reason:

> When a lease, an option to renew or similar provision, or a combination of these, is entered into on or after June 1, 1990, the amount due under the agreement and for the entire period covered (including renewals and/or options) will be immediately subject to sales tax.
>
> There is no provision in the New York State sales and use tax law to allow for refund [*4] of sales tax paid on the lease of a vehicle where the lessee relocated to another state where they may also be required to pay tax.

Petitioner challenged this denial by requesting a conciliation conference with the Division's Bureau of Conciliation and Mediation Services. Petitioner opted to have the conference decided upon correspondence and, after submission and review of such correspondence, a Conciliation Order (CMS No. 168676) dated January 15, 1999 was issued sustaining the Division's denial of petitioner's refund request.

Petitioner continued her challenge by filing a petition with the Division of Tax Appeals. Petitioner's position remains that she should be entitled to a refund of part of the sales tax paid, calculated as apportioned to the 25 payments on the lease remaining after she moved to California. Petitioner points out that without such a refund she will have paid the total New York sales tax, plus an additional $389.75 in California sales tax (15.59 x 25 payments = $389.75), rather than New York sales tax on only those lease payments made while petitioner was living in New York and the California sales tax thereafter.

The Division continues to oppose petitioner's [*5] refund claim for the reasons set forth in its May 22, 1998 refund denial letter. The Division's letter brief states that the tax was properly collected in the first instance (Tax Law § 1111[i][A]; 20 NYCRR 527.15), and that there is no provision under which such tax, properly imposed and collected, may be refunded under the circumstances presented (Tax Law §§ 1119, 1139). Finally, the Division points out that petitioner may be entitled to a reciprocity credit from the State of California based on the New York taxes already paid (20 NYCRR 527.15[f]), and it has advised her by letter to contact the State of California in this regard.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge noted the provision of Tax Law § 1111(i)(A) which provides that, with respect to the lease of a motor vehicle for a period of one year or more, the sales tax is due at the inception of the lease on the total amount of the lease payments for the entire term of the lease (20 NYCRR 527.15[a]). The Administrative Law Judge also noted that Tax Law § 1139 provides that a credit or refund is allowable for any tax which was erroneously, illegally or unconstitutionally collected [*6] or paid. However, in this case the Administrative Law Judge found that the lessor collected and the lessee paid the proper amount of sales tax on the transaction as required by Tax Law § 1111(i). Since petitioner made no claim nor submitted any evidence to the Administrative Law Judge that the tax was collected or paid erroneously, illegally or unconstitutionally, he found that there was no provision for the relief sought, despite the fact that the vehicle was relocated to another jurisdiction where it was subjected to further taxation.

ARGUMENTS ON EXCEPTION

On exception, petitioner argues that the Administrative Law Judge's Determination was issued in bad faith on the basis that despite the fact that there is no provision in the New York Tax Law for a refund of the sales tax in issue, there is also no provision prohibiting the refund of such sales tax. In addition, petitioner contends that the State of New York is not entitled to retain the sales tax collected.

OPINION

We affirm the determination of the Administrative Law Judge based upon the reasoning set forth in his determination. In addition, since the issuance of the determination in this matter, we have issued [*7] our decision in *Matter of Miehle* (Tax Appeals Tribunal, August 24, 2000) where we came to the same conclusion as the Administrative Law Judge herein.

In *Miehle*, we reviewed the enactment of the law which accelerated the collection of sales tax on certain leases of motor vehicles with a duration of one year or more (Tax Law § 1111[i]) and provided our rationale for concluding that the Legislature was aware of its failure to provide for a refund of said taxes, citing two instances where bills were introduced to provide for a refund in the case of early termination or non-renewal of a motor vehicle lease and the vehicle's destruction. We also noted the refund provision contained in Tax Law § 1139(f), which the Legislature provided for lessees that received a refund of their purchase price under the New York "lemon law" as further evidence that had a refund provision been intended it would have been specifically stated.

Petitioner concedes the absence of a refund provision in the statute, but argues that the statute does not prohibit the refund she requests. However, this is petitioner's interpretation of the statute's silence. The Division's regulation at 20 NYCRR 527.15(e), [*8] which is consistent with the terms of Tax Law § 1111, specifically provides that no refund will be allowed based upon an argument rooted in the theory that part of the lease payments were unused, as petitioner urges, since Tax Law § 1111(i) deems all the receipts to have been paid.

To prevail over the administrative construction, petitioner must establish not only that its interpretation of the law is a plausible one but, also, that its interpretation is the only reasonable construction [cite omitted]. Thus, unless the Department of Taxation and Finance's regulation is shown to be irrational and inconsistent with the statute [cite omitted], it should be upheld (*Matter of Blue Spruce Farms v. New York State Tax Comm.*, 99 AD2d 867, 472 NYS2d 744, 745, *affd* 64 NY2d 682, 485 NYS2d 526).

Since we have concluded the Division's interpretation is reasonable, petitioner's challenge is rejected.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Sandra Ann Torquato is denied;

2. The determination of the Administrative Law Judge is sustained;

3. The petition of Sandra Ann Torquato is denied; and

4. The Division of Taxation's denial of [*9] petitioner's refund application is sustained.

No. 04-1727

FILED
SEP 7 - 2005
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

RICHARD D. COHEN,

Petitioner,

v.

WORLD OMNI FINANCIAL CORP.,

Respondent.

On Petition For Writ Of Certiorari To The Circuit Court Of Florida, Palm Beach County

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

Respondent objects to the Question Presented proffered by Petitioner and offers the following as the correct issues to be considered in this Petition for Writ of Certiorari:

1. Whether the federal question presented by Petitioner was properly raised and decided by the courts below.

2. Whether the decisions below rested on "adequate and independent" state law grounds.

3. Whether the federal question presented by Petitioner raises any matter worthy of review by this Court.

CORPORATE DISCLOSURE STATEMENT

Respondent, World Omni Financial Corp., is a wholly owned subsidiary of JM Family Enterprises, Inc., a privately held corporation.

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STATEMENT OF THE CASE

At the outset, Respondent, World Omni Financial Corp. ("World Omni"), objects to the Statement of Case proffered by Petitioner, Richard D. Cohen ("Cohen"), on the grounds that it contains misstatements of fact and irrelevant material,[1] omits several key facts, and is argumentative. The following are the facts essential to a proper understanding of this case:

This is an action arising out of a thirty-six (36) month Closed-End Vehicle Lease Agreement (the "Lease") for a 1995 Land Rover Discovery (the "Vehicle") between Cohen and a dealer in New York dated May 13, 1995. The Lease was subsequently assigned to World Omni. [App. 4-19]. As required by New York law, sales tax for the entire term of the Lease was paid up-front by the dealer, which was then repaid in monthly installments by Cohen. [App. 28]. *See* N.Y. Tax Law § 1111(i). Although Cohen fails to mention it, New York law does not provide for a sales tax credit or refund under any circumstance. 20 N.Y.C.R.R. § 527.15(e). This fact is the heart of this case.

When Cohen moved from New York to Florida in June of 1996, World Omni, in accordance with Florida law, and as expressly provided by section 26 of the Lease, began charging Cohen for Florida Sales and Use Tax in the amount of six percent (6%), thereby increasing his monthly lease payment by $42.67. [App. 29]. Cohen paid the new monthly lease payments in full for approximately

---

[1] Cohen's references to market research and purported U.S. Census Bureau statistics were not part of the record below and have no relevance to this Petition. *See* Cohen's Petition for Writ of Certiorari, pp. 15-18.

fifteen (15) months (i.e., from July of 1996 to September of 1997). In October of 1997, however, Cohen refused to pay the additional 6%, now claiming that he was already paying New York sales tax. [App. 29, 38, 39]. World Omni advised Cohen that under Florida law, it was required to collect the tax and, therefore, Cohen was not entitled to a tax credit or refund for sales tax paid already to the State of New York. Despite the foregoing, Cohen unilaterally decided to "set-off" $643.05 (for the fifteen months he "mistakenly" paid the 6% Florida Sales and Use Tax) and, thereafter, paid only the monthly base payment (i.e., without the 6% Florida Sales and Use Tax). [App. 29-30, 40-43].

In February of 1998, Cohen was involved in an accident in which the Vehicle sustained rear-end collision damage. [App. 30-31]. A few weeks later, the Vehicle experienced a complete mechanical breakdown; it would not start and had to be towed to the dealer. The total estimated mechanical and collision damages were $3,343.28. [App. 89; App. 185-187]. Cohen refused to sign a written authorization to repair the damage to the Vehicle. In fact, up until the time of trial, Cohen argued that he had no obligation to maintain the Vehicle even though sections 12 and 17 of the Lease specifically and expressly required Cohen to keep the Vehicle in good working order and condition. [App. 11]. Based on the foregoing, and coupled with Cohen's failure to make the final two monthly payments due under the Lease,[2] World Omni

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[2] Remarkably, Cohen refused to make the final two payments because the Vehicle was inoperable. In an August 31, 1998 letter to World Omni's prior counsel, Cohen conceded the following: "[i]n February, 1998, the vehicle experienced a complete mechanical breakdown and was towed to the Land Rover dealership in North Dade. *After I was quoted a cost to repair the vehicle which was in excess of $2,000, I determined that it did*

(Continued on following page)

declared Cohen in default and repossessed the Vehicle on February 27, 1998. [App. 2, 37, 38]. As determined by the jury, the Vehicle was then sold in a commercially reasonable manner at public auction.

Upon Cohen's failure to pay the deficiency, on January 4, 2000, World Omni initiated this action in the County Court in the Fifteenth Judicial Circuit in and for Palm Beach County, Florida (the "County Court" or "lower court"). [App. 1-3]. On February 2, 2000, Cohen filed an Answer and Affirmative Defenses, and a Counterclaim against World Omni alleging breach of contract (i.e., World Omni breached the Lease by charging Florida Sales and Use Tax or, in the alternative, by failing to provide Cohen with a refund for the portion of New York sales tax already paid) and libel. [App. 26-36]. Notably, Cohen did not allege that the operative statute (i.e., Fla. Stat. § 212.06(8)(a)) was unconstitutional.

On May 2, 2000, World Omni filed a Motion for Final Summary Judgment on Cohen's Counterclaim. [App. 37-44]. In short, World Omni argued that Fla. Stat. § 212.06(8)(a) required it to charge Cohen for Florida Sales and Use Tax irrespective of the fact that Cohen was also being charged for New York sales tax. Cohen argued at least eight different points in opposition to World Omni's motion, however, for purposes of this Petition, he never argued that Fla. Stat. § 212.06(8)(a) was itself unconstitutional. [App. 45-63]. Instead, in his sixth point, Cohen argued that he was statutorily entitled to a credit under Fla. Stat. § 212.06(7) and absent such a credit, he would be subject to multiple taxation in violation of the

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not make business sense for me to proceed with the repairs at my expense given that there were only 3 months remaining under the lease . . ." (Emphasis added). [App. 185-187].

Commerce Clause. Curiously, Cohen went on to advise the lower court that it "*need not reach the statutory and constitutional issues in order to determine the case.*" (Emphasis added). [App. 59]. The lower court apparently agreed and did not reach the federal question when it granted World Omni's Motion for Summary Judgment on Cohen's Counterclaim by Order dated July 11, 2000. [App. 64-66]. Clearly, there was no need for the lower court to consider the federal question as: (1) Cohen's failure to repair the Vehicle and pay the final two payments under the Lease were independent bases for the default; and (2) Fla. Stat. § 212.06(8)(a) required "World Omni to collect the sales and use tax on the leased vehicle when Cohen moved to Florida." [App. 64-66]. Accordingly, the lower court held that Cohen was not entitled to a credit for the payment of the New York sales tax.

Subsequently, on July 17, 2000, Cohen belatedly moved to amend his Answer to include the affirmative defense that World Omni's attempt to collect Florida Sales and Use Tax on lease payments which were already subject to sales tax by the State of New York "violates limitations on State taxation imposed by the Commerce Clause of the United States Constitution." [App. 67-69]. Cohen's motion to amend was denied. [App. 84-85]. Accordingly, this issue, which is the gravamen of Cohen's Petition, was never pled or properly raised below.

On March 2, 2001, World Omni filed a Motion for Final Summary Judgment on the issue of liability. [R. 342-382]. Once again, Cohen never argued that the operative statute was unconstitutional. In fact, Cohen did not mention the Commerce Clause in his opposition papers. On April 9, 2001, the lower court granted World Omni's motion "as the court has previously ruled that Defendant Richard D. Cohen defaulted on the loan and the vehicle

was repossessed in accordance with the contract and the laws of New York and Florida." [App. 86-87].

The case went to trial and on March 13, 2003, the jury entered a verdict in favor of World Omni. [R. 3033]. Thereafter, the lower court awarded World Omni attorney's fees and costs.[3] [R. 3147, 3148] [R. 3326-27]. On August 19, 2003, Cohen appealed the July 11, 2000 Order granting World Omni's Motion for Summary Judgment on Cohen's Counterclaim, as well as the Final Judgment.[4] [App. 97-102]. In short, Cohen argued that the lower court erred in finding that he defaulted under the Lease because (1) he was entitled to a credit under Fla. Stat. § 212.06(7); and (2) Fla. Stat. § 212.06(8)(a) was inapplicable because Cohen did not apply for an exemption. Cohen went on to argue, not that the operative statute was unconstitutional, but rather that the lower court's construction of the statute violated the Commerce Clause since "there is a Constitutional obligation to grant a credit for Sales/Use taxes paid to other states." [App. 116].

On August 2, 2004, the Circuit Court, sitting in its appellate capacity, affirmed by *per curiam* opinion the lower court's Order granting World Omni's Motion for Final Summary Judgment on Cohen's Counterclaim, as well as the Final Judgment. [App. 134]. On August 9, 2004, Cohen filed a Motion for Rehearing and Request For a Written Opinion. [App. 135-137]. Both motions were denied.

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[3] Notably, Cohen currently has two separate appeals and two Writs of Prohibition pending in the state courts which relate to the attorneys' fees and costs award.

[4] The April 9, 2001 Order granting World Omni's Motion for Final Summary Judgment on liability was not appealed. [App. 86-87].